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No. 80-1436

In the Supreme Court of the United States

OCTOBER TERM, 1981

MALCOLM BALDRIGE, SECRETARY OF COMMERCE, AND BRUCE K. CHAPMAN, DIRECTOR, BUREAU OF THE CENSUS, PETITIONERS

v.

PETER SHAPIRO, ESSEX COUNTY EXECUTIVE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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We note at the outset that this case has been consolidated for argument with *McNichols* v. *Baldrige*, No. 80-1781, and that both respondent here and the petitioners in *McNichols* have sought to distinguish the two cases on their facts. Respondent correctly points out that this case concerns a request for disclosure of Census Bureau information under the Freedom of Information Act, while *McNichols* involves a civil discovery request for census information made in the course of a lawsuit challenging the census results for a particular locality. In addition,

respondent notes that the information sought in the instant case consists of all street addresses within the locality, whereas in *McNichols* the request is limited to the Bureau's lists of vacant dwelling units.[1]

In our view, these factual distinctions should not lead to different results. In both cases, the decisive question is whether Congress, in the Census Act, has prohibited the disclosure of Census Bureau address lists and other similar raw census information relating to individual census respondents. As we have argued in our opening brief in this case and in our brief in *McNichols*, the language, structure, history and purpose of the Census Act all compel an affirmative response to this question.

1. Respondent argues, however, that address lists utilized by the Census Bureau in carrying out its duties under the Census Act are not confidential under 13 U.S.C. 8(b) and 9(a) because, according to respondent (Br. 4, 12), address information is not "identified with" particular individuals. We do not know what respondent means in using the term "identified with."[2] That term does not appear in the

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[1] Respondent Shapiro asserts (Br. 17) that, unlike the petitioners in *McNichols*, he should be entitled to disclosure of address lists because such disclosure will not reveal the occupancy status of a building. The *McNichols* petitioners, on the other hand, allege (80-1781 Pet. Br. 21) that disclosure of addresses of vacant dwellings is permissible because if the dwellings are indeed vacant no one will be harmed. As we demonstrate in our main briefs in the two cases, both arguments are flawed.

[2] If respondent is arguing that the confidentiality provisions of the Census Act are designed simply to protect the identities (*i.e.*, names) of individuals and establishments, the argument is plainly wrong. See pages 5-6, *infra*.

text of 13 U.S.C. 8(b) or 9(a), nor does any judicial decision cited by respondent use that term as a test of what Congress meant in enacting the confidentiality provisions of the Census Act. If respondent is offering the amorphous phrase "identified with" as a test to be adopted by this Court, we believe the proposal should be firmly rejected. Such a test is wholly devoid of precision, workability, and statutory foundation.

In contrast, the test urged by the government concerning the scope of the confidentiality provisions of 13 U.S.C. 8(b) and 9(a) is precise, workable, and fully supported by the statutory wording and purpose of the Census Act. The government's position is that all raw census data relating to particular individuals or establishments (as distinguished from aggregate statistical data) is subject to the confidentiality mandate of the Census Act. Raw census data relating to individuals and establishments plainly includes addresses of residential dwellings. Such raw data in the possession of the Census Bureau is strictly confidential.

The government's position is firmly based on the language of 13 U.S.C. 8(b) and 9(a). In its express limitation upon the disclosure of "statistical materials," Section 8(b), as amended in 1976, incorporates the confidentiality mandate found in Section 9 of the Census Act. Under that mandate, only statistical materials (*i.e.*, aggregate statistics) that "do not disclose the information reported by, or on behalf of, any particular respondent" may be furnished to members of the public. 13 U.S.C. 8(b). The category of data prohibited from disclosure clearly includes information reported to the Census Bureau that relates to a particular individual, including the individual's address. Such data may not be dis-

closed, regardless whether the particular individual's name is withheld and regardless whether the data were originally reported to the Census Bureau by a person other than the occupant or owner of the residence in question.

Respondent attempts to avoid the clear thrust of the limiting language in Section 8(b) by arguing (1) that no limitation in Section 8(b) should apply if Section 9(a) itself does not apply (Br. 14-15); (2) that Section 9(a) assertedly does not apply to address lists or other raw census data used by the Census Bureau if a member of the public requests such data for a "statistical purpose" (Br. 13 n.8); and (3) that address lists "must naturally be included within the term 'statistical materials'" under Section 8(b) and should be disclosed notwithstanding the statutory limitations (Br. 15).

This convoluted argument is without merit. The limitation in Section 8(b) and the proscriptions in Section 9(a) are intended to accomplish the same purpose.[3] As we show in our opening brief (at 33-34 & n.25), the manifest intention of these provisions is to assure the public, whose cooperation is essential for an accurate census enumeration, that census data relating to particular individuals will remain confidential. No member of the public would seriously believe that the Census Bureau maintains its pledge of confidentiality if the Bureau were to divulge residential address data or other raw census data to local officials whenever they may choose to challenge the census results.

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[3] Regarding respondent's argument that address lists are "statistical materials" under Section 8(b), the D.C. Circuit in *Seymour* v. *Barabba*, 559 F.2d 806, 809 (1977), squarely held that "names and *addresses*" are not included within the term (emphasis added).

a. The confidentiality provisions of Section 9(a) traditionally have been regarded as sufficient expressions of the Bureau's longstanding policy of maintaining the strict secrecy of census data relating to individuals. At least until the district court's decision in this case, the wording of Section 9(a)(1)—prohibiting the Census Bureau from making any "use [of] the information furnished under [the Census Act] for any purpose other than the statistical purposes for which it is supplied"—was thought to be "a flat barrier to disclosure with no exercise of discretion permitted." *Seymour* v. *Barabba*, 559 F.2d 806, 808 (D.C. Cir. 1977). There is no doubt that publication or disclosure of raw census data by the Census Bureau would be a "use" of such data, and a "use" that Congress plainly intended to prevent.[4] The fact that respondent Shapiro and the petitioners in *McNichols* are alleging that *their* proposed use of the data is also for a statistical purpose, or is even a "use" that is consistent with the statistical purposes of the census, does not affect the prohibition in Section 9(a)(1) against use of raw census data for any purpose other than the *Bureau's* development of statistics.

b. Even if release of the Bureau's address lists to a party challenging census results would not violate Section 9(a)(1), such disclosure nevertheless would run afoul of Section 9(a)(2), which prohibits "any publication whereby the *data* furnished by any particular establishment or individual * * * can be identified." 13 U.S.C. 9(a)(2) (emphasis added). This

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[4] Section 9(b) of the Act confirms that "[t]he provisions of subsection (a) of this section relat[e] to *the confidential treatment of data for particular individuals and establishments* * * *." 13 U.S.C. 9(b) (emphasis added).

provision clearly means that identifiable data (*i.e.*, raw or non-aggregated data), including address data, pertaining to individuals or establishments, are confidential. There is no basis for respondent's repeated assertion (Resp. Br. 4, 12, 13, 15) that Section 9(a)(2) protects only the identities (*i.e.*, the names) of census respondents. As we have argued in our brief in *McNichols* (80-1781 Resp. Br. 18-19), the prohibition in Section 9(a)(2) clearly protects all identifiable data *relating to* particular respondents, not merely to data that directly *identifies* particular respondents. Addresses of residential dwellings plainly constitute identifiable data within the meaning of the proscription of Section 9(a)(2).[5]

c. Finally, Section 9(a)(3) of the Act prohibits persons other than Census Bureau officials and employees from examining individual reports. Master address registers are a compilation of address data that also appear on individual census reports. It is difficult, if not impossible, to believe that Congress intended its protections to be so weak as to permit the examination of raw information that appears on individual reports so long as that information is reprinted by the Bureau on another type of document.

The language of the Act plainly reveals the legislative intention to maintain strict confidentiality with

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[5] As we pointed out in our opening brief (at 36-37), while disclosure of this type of information may not reveal directly the identity of a particular individual, it would reveal information reported by or on behalf of individual census respondents and such information could be used to the individual's detriment. This result would be contrary to the intent of Congress, which expressly prohibited use of census information "to the detriment of any respondent or other person to whom such information relates, except in the prosecution of alleged violations of this title." 13 U.S.C. 8(c).

respect to raw census data in the hands of the Census Bureau relating to particular respondents. Only aggregate statistical materials—totals and subtotals of numerical figures—may be disclosed. Names, addresses or other raw data relating to individual respondents may not be disclosed. This is a clear, workable, and statutorily grounded distinction. Strict confidentiality of raw census data, and the public's perception of such confidentiality, is essential to fulfillment of the underlying purpose of an accurate census. This public perception of confidentiality cannot be assured in the face of amorphous tests, distinctions, and exceptions of the type urged by respondent.

2. Respondent argues that the legislative history of the Census Act reflects Congress' intention to protect only "identifiable individual data" (Resp. Br. 19). But this characterization of the scope of the Census Act's confidentiality mandate is not materially different from our own view that Congress meant to prohibit disclosure of all raw census data relating to individual respondents, such as lists containing addresses of individual dwelling units. If respondent is contending that particular addresses are not identifiable information, he is plainly wrong. Moreover, as we showed in our opening brief (at 16-18, 25-29), the legislative histories of not only the Census Act, but of the FOIA and Privacy Act as well, confirm that address lists and any other raw census information pertaining to individual persons or establishments are not subject to disclosure.

a. Respondent mistakenly contends (Br. 19 n.12) that, until the 1976 amendments to the Census Act, the Census Bureau was authorized, within its discre-

tion, to disclose "all census data including individual data." While it is true that the census statutes enacted in 1889 and 1899 contained provisions directing the Census Director to provide local government officials with information relating to individuals, in the succeeding Census Acts the authority of the Director to disclose such information was narrowed considerably. The 1889 Act provided for disclosure upon request and for a fee, to "any municipal government," of "the names, * * * age, sex, birthplace and color, or race of all persons enumerated" within the municipality's jurisdiction. Act of Mar. 1, 1889, ch. 319, Section 23, 25 Stat. 767.[6] The 1899 Act similarly provided for disclosure of "only" such information to states as well as to municipal governments. Act of Mar. 3, 1899, ch. 419, Section 30, 30 Stat. 1021.

In 1909 and in subsequent years, however, the Census Acts were modified to authorize the Census Director, in his discretion, to furnish state governors or courts of record "with certified copies of so much of the population or agricultural returns as may be requested." Act of July 2, 1909, ch. 2, Section 32, 36 Stat. 10. At the same time, the Act permitted the Director "to furnish to individuals such data from the population schedules as may be desired for genealogical or other proper purposes." *Ibid.* See Act of Mar. 3, 1919, ch. 97, Section 33, 40 Stat. 1301-1302; Act of June 18, 1929, ch. 28, Section 18, 46 Stat. 25-26. Thus, the 1909 Act and subsequent Acts no longer authorized disclosure to municipal

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[6] The statute that was in effect prior to 1889 required each enumerator to file with the clerk of the county court a list of all persons enumerated by him. The statute provided for public notification of the filing and for procedures to correct any errors in the enumeration. Act of Apr. 20, 1880, ch. 57, Section 6, 21 Stat. 75-76.

governments.[7] More importantly, these Acts no longer made reference to the routine disclosure of specific types of information relating to individuals, but rather permitted state governments and courts to receive only certified copies of the returns, *i.e.*, "a certificate of the *totals* arrived at." *Commonwealth ex rel. Woodring* v. *Walter*, 274 Pa. 553, 554, 118 A. 510, 511 (1922) (emphasis added). Information from the population "schedules" relating to individual respondents was made available only in a limited way for genealogical or similar legitimate purposes. In census parlance, "returns" refer to statistical results of the census, which are based on "schedules" containing responses to census inquiries.[8] Further-

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[7] Beginning in 1919, the Census Act authorized the Census Director to "furnish transcripts of tables and other records and to prepare special statistical compilations for State or local officials, private concerns, or individuals upon the payment of the actual cost of such work." Section 33 of the 1919 Act, 40 Stat. 1302. See also Section 18 of the 1929 Act, 46 Stat. 26; 13 U.S.C. (1970 ed.) 8(b). This provision, the predecessor to Section 8(b) of the current Act, quite clearly was limited to release of aggregate statistical data and did not permit disclosure of raw census data, such as lists of individual addresses.

[8] Prior to the 1960 census, when the Census Bureau first employed the mails as the principal method of collecting census responses to questionnaires, information in the decennial census was collected directly by census enumerators and recorded on schedules. See *Twenty Censuses, Population and Housing Questions: 1790-1980* (Department of Commerce 1979). Indeed, until 1976, the Census Act referred to "schedules" rather than "questionnaires." Compare 13 U.S.C. (1970 ed.) 5, with 13 U.S.C. 5. Contemporaneous dictionary definitions support the distinction drawn in the statutes between "returns" and "schedules." See 8 J. Murray, *New English Dictionary* (1914) (defining "return" in this context as "[a] report of a formal or official character giving information as

more, Section 25 of the 1909 Act, the forerunner of current Section 9(a), prohibited census officials from making publications "whereby the data furnished by any particular establishment can be identified" and from permitting anyone other than sworn census employees "to examine the individual reports." 36 Stat. 9. This provision was deemed desirable in order "to enlist that public confidence without which census inquiries must fail." H.R. Rep. No. 960, 60th Cong., 1st Sess. 23 (1908). Moreover, in enacting these provisions Congress acknowledged that

> [i]t is the policy of the Census Office to consider all schedules and other information officially obtained as for use exclusively for statistical purposes, and information is given in the confidence that that policy will be observed. The office is not a general information bureau, excepting for purely statistical data.

Id. at 5.

Congress further strengthened the confidentiality provisions of the Census Act in subsequent years. In 1919, Congress prohibited the use of census information "to the detriment of the person * * * to whom such information relates." Section 33, 40 Stat. 1302. And in 1929, Congress amended the Act to bar any publication that might identify the data furnished "by any particular establishment *or individual* * * *."

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to the numbers, amounts, etc., of the subjects of inquiry; a set of statistics compiled by order of some authority," and defining "schedule" in this context as "any tabular or classified statement, esp. one arranged under headings prescribed by official authority, as, e.g. an insolvent's statement of assets and liabilities, a return of particulars liable to income or other tax, and the like. Also occas. a blank form to be filled up by the insertion of particulars under the several headings."

Section 11, 46 Stat. 25 (emphasis added). Thus, contrary to respondent's contention (Br. 20 n.12), the pre-1976 amendments to the Census Act increasingly restricted disclosure.[9]

b. In 1976, Congress amended Section 8 of the Census Act to ensure further the confidentiality of raw census data. Section 8(a), as amended, permits the disclosure of information furnished by or on behalf of census respondents only to the respondents themselves, or their heirs, successors or authorized agents. See H.R. Conf. Rep. No. 94-1719, 94th

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[9] In Section 8 of its 1954 codification of the Census Act (Act of Aug. 31, 1954, ch. 1158, Section 8, 68 Stat. 1013), Congress inadvertently obfuscated the previous distinction between nonconfidential totals contained in the returns and the confidential information from population schedules that could be provided to individuals only for genealogical and other proper purposes. The 1954 codification authorized the Secretary, on request and in his discretion, to "furnish to Governors of States and Territories, courts of record, and individuals, data for genealogical and other proper purposes, from the population, agriculture, and housing *schedules* * * *." 13 U.S.C. (1970 ed.) 8(a) (emphasis added). There is no basis, however, for concluding that this new language was intended to create a new exception to the confidentiality mandate of the Census Act. The purpose of the 1954 codification was simply "to put the law in a form more useful and understandable," not "to make substantive changes." H.R. Rep. No. 1980, 83d Cong., 2d Sess. 1 (1954); S. Rep. No. 2497, 83d Cong., 2d Sess. 3 (1954). Case law interpreting the pre-1976 Census Act confirms that disclosure of raw census information in the hands of the Census Bureau relating to particular individuals or establishments was prohibited. See *St. Regis Paper Co.* v. *United States*, 368 U.S. 208, 217, 218 (1961); *United States* v. *Bethlehem Steel Corp.*, 21 F.R.D. 568, 569-570 (S.D.N.Y. 1958); *United States* v. *International Business Machines Corp.*, 1975-2 Trade Cas. (CCH) ¶ 60,383 (S.D.N.Y. 1975).

Cong., 2d Sess. 10 (1976); S. Rep. No. 94-1256, 94th Cong., 2d Sess. 3-4 (1976); H.R. Rep. No. 94-944, 94th Cong., 2d Sess. 5 (1976). The Senate Report noted that these changes were consistent with the Census Bureau's present practice. S. Rep. No. 94-1256, *supra*, at 4. See 15 C.F.R. Part 80 (1976). In addition, the Report stated that Section 8(b) of the Act, as amended, "ensures that the authority of the Secretary of Commerce to furnish statistical tabulations or other material to public and private entities does not extend to any material which might disclose information reported by, or on behalf of, any respondent." S. Rep. No. 94-1256, *supra*, at 4. Finally, the Report observed that the amendment to Section 8(c), providing for access to "documentary evidence in the prosecution of those who would violate the confidentiality of the census records" was necessary "[t]o guarantee the privacy of respondents." S. Rep. No. 94-1256, *supra*, at 4. Thus, the history of the 1976 amendments establishes that there is no reasonable basis for respondent's claim that the Census Act, as currently in effect, permits the disclosure to local government officials of lists of individual addresses or other similar raw census data.[10]

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[10] We note that respondent purports to rely (Br. 20-21 & n.13) on the history of certain unenacted legislative proposals (H.R. 12884, 91st Cong., 1st Sess. (1969), and H.R. 14153, 92d Cong., 2d Sess. (1972)). To the extent that this history sheds light on the 1976 amendments to the Census Act, however, it strongly supports our submission that Congress was concerned with ensuring the confidentiality of raw census information relating to particular respondents. See H.R. Rep. No. 92-1288, 92d Cong., 2d Sess. 11-12 (1972); H.R. Rep. No. 91-407, 91st Cong., 1st Sess. 6-8 (1969); 115 Cong. Rec. 27019 (1969) (remarks of Rep. Wilson); *id.* at 27020 (re-

In fact, in 1977 Congress refused to enact legislation that would have authorized the Secretary of Commerce to allow state or local government officials challenging the Census Bureau's estimates to have access to the data on which the estimates were based. H.R. 8871, 95th Cong., 1st Sess. (1977). This proposal would have given local government officials, such as respondent and the petitioners in *McNichols*, access to the very same types of raw census data that they now claim they are entitled to examine under present law. The criticisms levelled at this proposal apply with equal force to respondent's claimed right of access to raw census information relating to individual respondents. For example, Courtenay M. Slater, Chief Economist for the Department of Commerce, stated:

> The success of Census Bureau data collection efforts is dependent on public trust that the confidentiality of individual responses will be protected. The Bureau has a long and proud record of rigorous protection of confidentiality. H.R. 8871 would permit access to Census Bureau records by many, many diverse persons who are not Census Bureau employees. It is inevitable that this would erode the public's confidence that the privacy of their responses can continue to be protected. It is hard for me to think of anything more certain to increase the undercount in the 1980 census than public fear that confidentiality might be breached.

The Census Reform Act: Hearings on H.R. 8871 Before the Subcomm. on Census and Population of the House Comm. on Post Office and Civil Service,

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marks of Rep. Meskill); *id.* at 27024 (remarks of Rep. Gallagher); *id.* at 27033 (remarks of Rep. Broyhill).

95th Cong., 1st Sess. 34 (1977). See *id.* at 13 (statement of Richard Scammon, former Census Director); *id.* at 43-44 (statement of Census Director Manuel D. Plotkin); *id.* at 63 (letter from C.L. Haslam, General Counsel, Department of Commerce).

3. Finally, we note that the New York amici refer (Br. 13) to an incident in which a census employee in Peekskill, New York, disclosed to local government officials address registers for several enumeration districts within Peekskill. But this isolated instance of an unauthorized disclosure by a low-level census employee of a small number of address registers—an action that was plainly contrary both to the Census Act and to the Bureau's firm policy of nondisclosure of such information—hardly supports respondent's position. The disclosure met with prompt Census Bureau disapproval and instructions not to repeat the practice. Moreover, the mere fact that a government employee acted improperly on one occasion does not estop the government from insisting that the law be complied with or change the meaning of a statute. See *Schweiker* v. *Hansen*, No. 80-1162 (Apr. 6, 1981); *INS* v. *Hibi*, 441 U.S. 5, 8-9 (1973); *Federal Crop Insurance Co.* v. *Merrill*, 332 U.S. 380 (1947).[11]

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[11] That the Census Bureau takes seriously its obligation to ensure the confidentiality of raw census data is underscored by the fact that in the New York litigation the Bureau refused to comply with a district court order compelling the disclosure of master address registers. As a sanction for this refusal, the district court precluded the government from rebutting New York's claim that the census in New York was mismanaged and was grossly inaccurate. *Carey* v. *Klutznick*, 508 F.Supp. 420 (S.D.N.Y. 1980), rev'd, 653 F.2d 732 (2d Cir. 1981), petition for cert. pending, No. 81-752. Thus, the government risked an adverse decision on the merits in New York simply to trigger an appellate test of the Bureau's confidentiality claim. (Unlike the Tenth Circuit in *McNichols*,

As we have already explained, the major purpose of the statutes protecting census confidentiality is to foster public participation and confidence in the decennial census. The key to this participation and confidence is the public's perception that information they give the Census Bureau for statistical purposes will not be released to others. That perception may survive an isolated and unauthorized disclosure in upstate New York, which receives no great notoriety, but it may well evaporate in the face of court orders piercing the confidentiality shield whenever a local government demands access to heretofore nonpublic census materials. That is the danger inherent in the district courts' disclosure orders in this case and in *McNichols*, and that is the danger this Court can eliminate by effectuating Congress' plain intent that raw census information relating to individual respondents is not subject to public disclosure.

For the foregoing reasons and the reasons set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 1981

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the Second Circuit refused to permit an interlocutory appeal from the district court's disclosure order.)

Further evidence that the government takes seriously the confidentiality mandate of the Census Act is provided by the recent indictment of a Census Bureau employee for knowingly disclosing information from the 1980 census that came into her possession in the course of her employment, in violation of 13 U.S.C. 214. *United States* v. *Hibler*, No. 81-30245 (M.D. Tenn., filed Nov. 18, 1981).

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